No. 4037

In the United States Circuit Court of Appeals

For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiff in Error,

—VS.—

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF DEFENDANT IN ERROR

THOS. P. REVELLE,
United States Attorney,
CHARLES P. MORIARTY,
Special Assistant United States Attorney,
J. W. HOAR,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Address: 310 Federal Building, Seattle, Wash.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

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STATEMENT OF THE CASE

The plaintiffs in error, Tom Pappas, Charles H. Ferguson and Oliver Thompson were found guilty of the offense of the possession, transportation and sale of intoxicating liquor in violation of the Act

of Congress passed October 28, 1919, known as the National Prohibition Act, on the 30th day of June, 1922, and the plaintiffs in error, Tom Pappas and Charles H. Ferguson, were each sentenced to serve a term of six months in the county jail and to pay a fine of $500, while the defendant Oliver Thompson was sentenced to serve ninety days in the County Jail.

The undisputed facts of the case are as follows: That on the 29th day of June, 1922, in the evening, H. V. Mooring, a National Prohibition Officer, made arrangements with Tom Pappas, one of the plaintiffs in error, for the delivery and sale of whiskey to Mooring on the following day. That about 2 o'clock the following afternoon, Pappas and plaintiff in error, Ferguson, drove up to Mooring's home in Ferguson's car and Mooring gave Pappas an order for 2 cases of whiskey to be delivered to Mooring's garage as soon as it could be obtained; that Ferguson and Pappas then left and returned about two hours later, together with plaintiff in error Thompson, and about 9 sacks of liquor consisting of whiskey and beer; that they drove up to and into the alley near Mooring's garage; that Pappas then got out of the car and went over toward Mooring's garage, a distance of about 15 or

20 feet to where Mooring was standing, and received from Mooring $55.00 in currency and a check for $80.00 and was assisting Mooring in moving a piece of canvas to be used in concealing the liquor when he (Pappas) and the plaintiffs in error were placed under arrest by Mooring and two other Prohibition agents who had been previously stationed in the garage; none of the liquor had been removed from Ferguson's car.

The evidence of defendant Pappas during the trial admitted substantially all of the transactions had with Mooring leading up to the delivery and sale of the liquor, but he attempted to explain and justify his part in the deal upon the theory that he was a special Deputy Sheriff of King County; that he owned no liquor himself, but at the request of the office of the Sheriff of King County, he had been endeavoring to locate 200 cases of liquor which Ferguson was supposed to possess in a cache somewhere; that he was attempting to bring Mooring and Ferguson together and would in that manner locate the cache and have Ferguson and Mooring arrested after the sale and delivery of the liquor; that the liquor seized belonged to Ferguson; that Ferguson would not go after the liquor until he had seen the party to whom it was to be sold and

delivered; that after he (Ferguson) had satisfied himself that the deal was all right by visiting Mooring in advance, he went after Thompson, to whom he referred as his "partner"; that after a consultation with Thompson, it was announced that Pappas could not accompany them to get the liquor and they would pick him up when they returned; that this refusal was due to their distrust of Pappas at that time; later they returned and the three of them drove to Mooring's garage and that while Pappas was helping Mooring to move a tent to be used to cover the liquor, Mooring slipped a roll of currency into his hands, telling him to hold it, and that before he could remonstrate or notify the sheriff's office of the deal, he was arrested.

Defendant Ferguson, by his evidence, attempted to show that he accidentally met Pappas on the street and at the request of Pappas, he drove Pappas to Mooring's house on the 30th of June, 1922, the afternoon in question; that Pappas got out of the car and had a conversation with Mooring "right outside the car," but that Ferguson did not hear any of it, and did not hear Mooring give an order for any liquor; that immediately thereafter, Pappas requested him to drive to a certain house

in one of the outlying parts of Seattle, to get a "couple of packages"; that when he and Thompson, whom he met quite by accident at the Windsor Pool Room, arrived at the place designated, he could see no house, but some men whom he did not know were standing by the road who asked him if he was Ferguson and if he had been sent by Pappas, and *they* put the sacks in his car; that he was not the owner of the liquor and had no reason to suspect that he was hauling liquor, or that he was being asked to haul liquor; that at no time from the time when he first met Pappas, had liquor been mentioned to him; that he was hauling the sacks as an accommodation only; that he did not hear any bottles rattle in the sacks; that he did not hear any of the conversation between Mooring and Pappas when they arrived at Mooring's house the second time for delivery of liquor and did not see any money pass.

Defendant Thompson, by his evidence, attempted to show that Ferguson merely asked him to take a ride in his car; that he had no interest in the liquor or in the transaction; that he had no reason to suspect that there was liquor or bottles in any of the 9 sacks placed in the rear of the car; that he had known Ferguson for a number of years

and had worked for him "on and off" as an engineer on his boats; that he was nothing more or less than a passenger or guest in Ferguson's car.

ARGUMENT

The brief of the plaintiffs in error, Charles H. Ferguson and Walter Thompson, presents for the consideration of this court three questions, viz.:

(1) Did the court err in admitting the evidence of the prohibition agents of declarations made to them by plaintiff in error Tom Pappas after his arrest and without the presence of the plaintiffs in error Ferguson and Thompson to the previous statements of the said Tom Pappas made to the deput sheriffs without the presence of the said plaintiffs in error Ferguson and Thompson as to their violations of the law, and the statements of the plaintiff in error Tom Pappas himself, as to what was said to him by the plaintiffs in error and what he said to the sheriff regarding said plaintiffs in error in their absence? And if so, was it prejudicial error.)

(2) Did the court err in overruling the motion in arrest of judgment and for a new trial made by the counsel for plaintiffs in error?

(3) Was the jury properly instructed?

In the trial of the case, the court permitted prohibition agents to testify to conversations and declarations made to them b Pappas after his arrest upon the theory that they were binding, first, upon Pappas himself as one of the defendants, and second, that if it should develop that there was sufficient evidence before the jury to permit them to find that a conspiracy existed among the defendants to violate the law, that said declarations and admissions may be binding upon the defendants Ferguson and Thompson, although made in their absence. It is urged by counsel for plaintiffs in error that none of these statements made after the arrest were admissible until the court had first affirmatively decided that a conspiracy existed. The Government concedes that as a general statement of law, counsel's position is correct when applied to certain cases, but contends that in this case they were properly admissible under the correct instructions and guidance of the court.

In the case of *State vs. Mann*, 39 Washington 150, the following appears in a case where the confession of a wife jointly charged with a husband with the crime of arson made after arrest was admitted against the husband over objection

of appellant and its admission was assigned as error, the court said:

> "The first (objection) is that the confession of one conspirator made after the conspiracy has come to an end can not be given in evidence as against a joint conspirator. A long list of cases is cited in support of this contention and undoubtedly the rule is correctly stated in the case of the appellant but as we have before pointed out, the appellant was informed against and tried for a *consummated offense*, not for conspiracy with another or others to commit an offence, and the rules applicable to the admission and introduction of evidence in the one case are not the same as they are in the other. * * * In order to convict the appellant, it was necessary for the state to prove the crime as alleged; that is to say, it must show, first, that Nettie Mann committed a crime of arson, and second, that the appellant aided and abetted her therein. The state, in order to prove the first of the requests, resorted to any evidence which would have been admissible had Nettie Mann herself been upon trial. This would include her confessions and admissions, as well as any other competent evidence tending to prove the crime as laid. But it is thought the confessions were inadmissible because they implicated the appellant. Such is not the rule. The jury are ordinarily entitled to confessions as they are made, and in this case to have eliminated from the confessions, all reference to the

appellant would have left them unintelligible and incompetent for an purpose. The authorities, so far as we have been permitted to examine them, uniformly hold that the act, declarations and confessions of the principle are admissible as evidence on a separate trial of the accessory."

In 44 Washington 207 at page 209, *State vs. Dilley*, the court said:

"'I think I will rule this way; that her statements made at that time, if she made any, are competent evidence against her at this time. But as to whether or not it constitutes any evidence against the other two defendants depends upon whether or not proof shows that there was concerted action between all three of the defendants'. We think this was manifestly the correct ruling at the time. The conversations were certainly admissible as against Mrs. Dilley. As the State could not introduce its whole chain of evidence at one time it remained to be seen whether such facts would appear as would make it admissible against the co-appellants. The parties were being tried jointly, and such evidence as was admissible against one of them was properly admitted. Its applicability to the others to be thereafter controlled by proper instructions when all of the evidence was introduced. For convenience, the acts and declarations of one are admitted before sufficient proof of a conspiracy is given, the State undertaking to furnish such proof at

> a subsequent stage of the cause. 1 Greenleaf, Evidence, 16 Ed. 184-A; *State vs. Winner*, 17 Kans. 298; Underhill Criminal Evidence, par. 494."

In the case of *State vs. Williams*, 62 Wash. 286, at page 290, after citing the next preceding quotation with approval, the Court said:

> "In the several cases cited by this Court, and to which we have referred, there was no charge of conspiracy made in the information, the Dilley case and the McCann case being robbery cases and the charges being brought under the statute defined with crime. It is thus indicated that the admissibility of such testimony can not be resolved by looking to the form of the pleading. It must be decided by reference to the facts and circumstances of the particular case. If the defendant be charged with another, and the facts show a concert of action, a verdict will not be overthrown because it has been necessary in the development of the case to show the conduct and conversation of the parties and if in the end it is made to appear that both of the defendants were parties to the crime. 3 Encyclopedia, Evidence 420, *Goins vs. State*, 46 Ohio State 457; 21 N. E. 476; *State vs. Montgomery*, 56 Iowa 195, 9 N. W. 120.

In *State vs. Pettit*, 74 Wash. 510 at page 521, the Court said:

"There is sufficient evidence that the defendant and his wife were acting in concert with a common criminal design to make the declarations of the wife admissible as against her husband the defendant. Where concert of action is shown, every party thereto becomes a party to the particular as well as the subsequent acts of others in furtherance of the common design. In 1 Greenleaf on Evidence, 16th Edition, par 184-a, it is said:

'Every one who does enter into a common practice or design is generally deemed, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design.' "

In 16 Corpus Juris, p. 65, par. 1288 we find:

" * * * When on a joint trial of several defendants, evidence of declarations by one is attempted against him, although not admissible against the others because no conspiracy has been shown, subsequent proof of the conspiracy authorizes consideration of such evidence against all defendants shown to have been parties thereto. 181 Mass. 184, 63 N. E. 421."

In *State vs. Wappenstein*, 67 Wn. 502, at page 511, the Court quotes from 8 Cyc, 682 as follows:

"On account of the difficulty in proving the conspiracy and bringing the guilty to justice,

there is no class of cases in which it has seemed important that the trial judge should have a large discretion as to the order in which evidence should be received, and this discretion can not be reviewed on error except in clear cases of abuse. It is frequently said that the acts and declarations of one conspirator can not be admitted in evidence against his fellow conspirator until proof has been made of the existence of a conspiracy. There is, however, no varying rule to this effect. According to the court, weight of authority or order in which the testimony shall be received is largely in the discretion of the trial court. If the circumstances of the case are so peculiar and urgent as to require it, the acts and declarations of a conspirator may be introduced in the first instance before proof of the agreement."

In the case of *Latham vs. United States*, 210 Federal, 159 at page 161, the Court said:

"In this connection we notice that the trial court instructed the jury that if they believed beyond reasonable doubt that there was a common practice and design upon the part of John Northcott and Henry Latham that the witness, Bessie Pettit, should be transported from Grand Saline, Texas, to New Orleans, Ala., over the line of a common carrier in interstate journey for the purpose of prostitution, then the statements made by Northcott to the witness, Bessie Pettit, bearing upon the common

practice and design, would be admissible as evidence against the defendant Latham; but, if no such common practice or design was shown, the evidence should not be considered by them against the defendant Latham. There can be no doubt that the rights of the defendant, with regard to this evidence, were fully protected."

See also

Sparf vs. U. S., 156 U. S. 51, at page 57.

In 263 Federal 12, at page 15, par. 2, the Court said:

"When it is said that error was committed in allowing the attorney for Antoon to testify that after the latter had told the former as to his transaction with Samaras, the attorney took Antoon to the United States Attorney's office, which led to the indictment in this case. We are told that this is a clear violation of the rule, that what is said or done by one of the conspirators after the conspiracy is ended in the absence of the defendants on trial, is totally inadmissible. The rule is admitted, but its application to the facts is denied. On his direct examination, Antoon testified that he first went to his attorney and told his story and that his attorney took him to the District Judge to whom he confessed his crime. The attorney was permitted to testify that, after Antoon confessed to him, instead of taking Antoon first to the district attorney, he took him direct to the District Judge. *This is*

simply a part of the history of the transaction, and as such the Government was entitled to it. The objection at all events seems to us quite unimportant and we fail to see any relation between this occurrence and the rule that the statement of a conspirator in the absence of his common conspirators, after the conspiracy is ended, is not admissible."

In 279 Federal 255, the Court said:

"The theory of the prosecution was that Parisi was a principle and that he had aided, abetted, etc. Sara Cina and Frank in making the unlawful sale on November 9 * * *. That it was not necessary that one who aids and abets the commission of a crime need be present when a crime is committed is no longer arguable. *Vane vs. United States*, 254 Federal 32. The testimony as to the conversations and events of November 10 was adduced not for the purpose of proving the commission of a crime on November 10, but to show that Parisi was a party to the sale by Sara Cina and Frank the night before. That admissions or confessions made after the commission of a crime are admissible in evidence, when properly obtained, is too elementary for discussion. So, also the finding later in defendant's possession of a quantity of drugs of the same kind as previously sold is a fact which, woth other facts, was properly submitted to the jury.

In *Burns vs. United States*, 279 Federal 982, p. 986, the Court said:

> "It is also argued that the Court erred in permitting several witnesses to testify to statements made to them by Banks when they turned over their money to Banks to the effect that Burns was interested with him in the cattle and hog business. Conceding this to have been an error, it is not prejudicial because Burns later went on the stand and testified that he and Banks were to share the profits."

The defendant in error contends that the declaration and statements made in this case by Pappas, Ferguson and Thompson to the various prohibition officers were admitted by the Court under proper instructions so as to safeguard each defendant in his rights. That if any error were committed by the Court in permitting the introduction of the statements of Pappas relative to Ferguson and Thompson, it was harmless error and not prejudicial to the defendants Ferguson and Thompson, because the defendant Pappas took the stand and testified to practically the entire testimony of the Government agents concerning his declarations and was subjected to cross-examination by counsel for defendants Ferguson and Thompson.

The testimony given by Pappas relative to conversations had with deputies in the office of the Sheriff of King County were clearly admissible as

tending to show that he was performing his duties as an alleged officer of the law, and it was for the jury to determine whether or not to believe his testimony. Had such testimony been excluded by the trial court, it would have been reversible error. In 9 Cranch 71, 74, 3 L. Ed. 660, it is said:

> "It can not be regarded as an oppressive rule to require of a party who has violated a penal statute to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if, in the course of such vindication he shall pass in silence, or leave unexplained, circumstances which militate strongly against the intergrity of the transaction, he can not complain if the Court shall lay hold of those circumstances as reasons for adjudging him in delicito."

The defendant Pappas was entitled to explain his conduct in any reasonable manner; if he had not done so, his silence would have been construed strongly against him.

Assignment number two is directed to the error in the instructions to the jury given by the Court. In addition to the instructions quoted in the brief of plaintiff in error, on pages 35 and 36, the Court instructed the jury as follows:

> "You are instructed that as a matter of law if the defendant Thompson was an innocent

spectator on this trip and merely a passenger or guest—a passenger upon Ferguson's car, or a guest of Ferguson accompanying him upon this trip, innocent of the purpose or motives of this trip, and had nothing to do with it, then the defendant Thompson would not be guilty, because he did not have guilty knowledge of anything that transpired.

"You are instructed that if the defendant Ferguson went out there to get some packages, he not knowing what the packages were, and not knowing what the packages were placed into the car for, and hauled this whiskey from the place where it was loaded into the car to the place where it was found, he not knowing what it was, he, the defendant Ferguson would not be guilty. * * *

"So, in this case, it is for you to determine what relation these defendants had to this transaction and what the facts were.

" * * * But, if such conspiracy or confederation has not been established, then you may not consider a statement testified, to as made here in the absence of such defendant, against that defendant, but it can only be considered against the person who made it. * * *

"In this case, you will consider this case fairly and conclude it from the evidence as you have heard it, and as it has been developed and disclosed by the witnesses upon the stand. * * *"

The Government contends that if any error was

committed by the Court, the same was cured when the entire charge of the Court is considered; the jury found all three defendants guilty of each count charged in the information and under the instructions of the Court it must be presumed that they found a common intention and design by the defendants to violate the law. In *Bryant vs. United States*, 257 Federal, p. 383, the Court said:

> "The plaintiffs in error complained of the admission in evidence of an alleged statement testified to by the Government witness Williams to have been made by their co-defendant Bergfeldt, who was acquitted, that he had papers in his possession that might put him in the penitentiary if it were known. The admissibility of this statement, as against the defendant, who made it, is clear. If admissible as to Bergfeldt, the other defendants should have requested that its effect be limited to Bergfeldt in order to put the Court in error for not so limtiing it. However, Bergfeldt was acquitted, and in order to reach that result, the jury must have found that he did not conspire with any of the plaintiffs in error for the indictment charged no other offense against him. The Court did charge the jury that they should consider declarations of defendants only against themselves, or those of their co-defendants who were shown to have been present and to have heard them, unless they first found a conspiracy to have existed between the defendant

> making the declaration and those against whom it was asked to be considered. The jury, therefore, as they were instructed, must have considered the statement objected to against Bergfeldt only, since they found the plaintiffs in error had not conspired with him by their verdict of acquittal. Its admission, therefore, worked no injury to the plaintiffs in error."

The third error assigned is that the court failed to sustain the motion made by plaintiffs in error for a new trial and in arrest of judgment for insufficiency of the evidence to show that Ferguson had anything more to do with the transaction than as a freighter and that Thompson was anything more than a passenger or guest in Ferguson's car.

The Government contends that there was ample evidence to show, in light of all of the surrounding circumstances, that defendants Ferguson and Thompson must have known that there was liquor in the sacks being hauled; that they were men of experience, Ferguson having admitted under oath that he had at some previous time caused the dismissal of police officers for "knocking him over" and taking liquor away from him; that the fact that all three defendants were present at the sale of the liquor, and had same in their possession, constituted a *prima facie* case of knowledge and

criminal intent on the part of all three defendants, and put upon them the burden of making a clear and satisfactory explanation of their possession. In Bishop on Criminal Iaw, Vol. I, Par. 656, it is said:

> "If persons are together committing a misdemeanor, each one's act is that of all, the same as in felony; for the same reasons control this case as the other. And the possession of a thing by one contrary to the prohibition of a statute, is the possession of all."

To the same effect and necessity of explanation, reference is made to the citation hereinbefore set forth from 9 Cranch 71, 74, 3 L. Ed. 660.

The defendants attempt to explain the acquisition of the liquor in different ways and seek to say that it was delivered to the car by some mysterious persons, whom nobody knows, and whom none of the defendants had ever seen before, which is the alibi of guilty persons, with their backs to the wall, as ancient as the law itself; their testimony does not agree, but the fact remains that an order was taken for liquor and by two of the defendants, and in less than two hours time, a delivery was made and the sale consummated, as to part of the liquor and no explanation given as to the destination of the balance of the contraband; the defendants Ferguson and Thompson ask to be exonerated because they

were not present when the original negotations were entered into; In *Samara vs. United States* before referred to, we find, on page 16 in 263 Federal Reports:

> "The Court was asked at the close of the case to direct the jury to acquit the defendant Baloutin, both on the first and second counts. This the Court refused to do, and the refusal has been assigned as error. It would serve no good purpose to review in detail the testimony in relation to this particular defendant. We have read it with care, and we are entirely satisfied that the Court was quite justified in leaving the question of Baloutin's guilt to the jury. It is not at all material whether he was one of the original conspirators or not; for the law is clearly established that, when a conspiracy is once entered into by two or more persons, others may join while it is continuing, and if they do, they make themselves liable to the same extent as those who originated it. It is sufficient that Baloutin came into the conspiracy prior to the consummation of the act to be done in pursuance thereof. *United States vs. Stone* (D. C.) 188 Fed. 836. A person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before or after, in furtherance of the common design. *Hedderly vs. United States*, 193 Fed. 561, 114 C. C. A. 227."

In *Bannon vs. United States*, 156 U. S. 464 at 469 the court says:

"To require an overt act to be proven against every member of the conspiracy or o distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles but would render most prosecutions nugatory."

II Wharton Crim. Cases, Par. 698 at page 1432:

"Hence a foundation must be first laid by other evidence, by proof sufficient in the opinion of the court to establish *prima facie* the fact of a conspiracy between the parties. Where the evidence is sufficient in the opinion of the court to establish the *prima facie* case, and it is admitted, it is for the jury to say upon all the evidence under the instructions of the court, whether or not the conspiracy existed. The evidence supporting a conspiracy is generally circumstantial; it is not necessary to prove any direct act, or even any meeting of the conspirators, as the fact of conspiracy must be collected from the collateral circumstances of each case. It is for the court to say whether or not such connection has been sufficiently shown, but when that is done, the doctrine applies that each party is an agent for all the others, so that an act done by one, in furthering the unlawful design, is the act of all, and a declaration made by one, at the time, is evidence against all."

It is submitted that there was ample evidence

proper to go to the jury and tending to establish every element of the crime charged in the information, and that the weight and credibility of this evidence was for the jury; and that if the trial court did not feel warranted in sustaining the motion in arrest of judgment or in granting the plaintiffs in error a new trial, for this court to do so, would be a plain usurpation of the functions of the jury.

In 12 Cyc. pp. 906, 907, 908, we find:

> "It is difficult to formulate a general rule stating the extent to which appellate courts will pass upon the weight and sufficiency of evidence and reverse because of an insufficiency of evidence, but the general rule seems to be that where there is material evidence tending to prove defendant's guilt before the jury, and the trial court refuses to set their verdict aside, an appellate court will not reverse the action of both the trial court and the jury; that it will examine the record to see whether there is evidence proper to go to the jury, and upon which a verdict of guilt might reasonably be founded, and, being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. If, however, the verdict of the jury is altogether unsupported by any evidence whatever, or if it is against the evidence and every proper inference which is reasonably

deducible therefrom, the judgment will be reversed by the appellate court."

It is earnestly contended that the court protected the plaintiff's in error in their rights at every step of the trial and that at the conclusion of the testimony, if any errors were committed during the trial, they were completely cured by the lengthy and thorough instructions to the jury relative to the rights of, and consideration due to each defendant; and that the jury upon proper instructions and upon competent testimony found each of the plaintiffs in error guilty of each count in the information; and that the writ of the plaintiffs in error should be dismissed and the judgment and sentence be affirmed.

AS TO THE PLAINTIFF IN ERROR, PAPPAS

Plaintiff in Error Pappas has filed a brief where assigns certain assignments which are generally covered in this brief as to Ferguson and Thompson. There is no argument made in his brief in support of his assignments and we do not deem it wise to burden the court with a fuller explanation of the facts than have already been set forth. The wierd and rambling story of this special deputy sheriff is sufficient to convict him. His greed for filthy lucre has led him from an honorable path into the

path of crime and now he wishes to hide himself under the shield of law and order. The entire record discloses page by page his business to be bootlegging instead of an honorable occupation. The jury heard the evidence; the contention of the plaintiff in error, Pappas was fully and fairly covered by the court's instructions and the verdict of the jury stamps his statements as untrue. If there is anyone guilty of the violation of law in this case it is the plaintiff in error. The Government's witnesses demonstrated conclusively that he was the moving party in the transaction and that his integrity was so established that even his co-defendants did not deem him worthy of trust. It may be said in conclusion that when thieves fall out the just men get their dues, and in this case the plaintiff in error Pappas and his co-defendants were so busy trying to convict the others and save themselves that they lost sight of the fact that they were on trial and told the jury the truth.

The Government contends that the writ of error should be dismissed and that the judgment and sentence should be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
CHARLES P. MORIARTY,
Special Assistant United States Attorney,
J. W. HOAR,
Assistant United States Attorney,
Attorneys for Defendant in Error.